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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-36

CHARLES R. PERRY, *et al.*,

v.

ROBERT P. SINDERMANN

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

The American Association of University Professors appears *amicus curiae*, with consent of all parties, in support of respondent.

INTEREST OF AMICUS CURIAE

The American Association of University Professors (the "AAUP"), founded in 1915, is the national professional organization consisting exclusively of teachers and research scholars in all disciplines at accredited colleges and universities throughout the United States. The Association includes over 1275 chapters and has more than 90,000 members. It is estimated that such members comprise approximately 30% of the full time teaching faculty of accredited institutions of higher learning.

From its founding, the Association has been fundamentally committed to the protection of academic freedom. That commitment involves not only a concern for substantive rights and liberties of faculty members, but also for the procedures used in termination of academic appointments. On various occasions, through statements of general applicability and investigation of particular personnel matters, the Association has declared this concern for fair and adequate procedures. It has consistently asserted that academic freedom cannot flourish unless such procedures are observed by college and university officials and governing boards.

Early Association statements focused primarily upon procedures appropriate to the termination of faculty appointments through dismissal action. Thus, broad procedural, as well as substantive, guidelines protective of tenure as a principal safeguard of academic freedom were contained in the 1940 *Statement of Principles on Academic Freedom and Tenure* (the "1940 *Statement*"), a policy statement which in the past three decades has received the endorsement of some 80-odd professional and educational organizations and societies. Especial attention was given to the matter of

procedures in a 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings,* which, like the 1940 *Statement,* was jointly formulated by AAUP and the Association of American Colleges. Both *Statements* are found in the Appendix to this Brief.

An underlying principle of the procedures developed in these two *Statements,* commonly referred to as academic due process, is that tenure can perform its intended function only if it carries with it protection—or perhaps more accurately assurance of protection—against dismissal except (i) for reasons related directly and substantially to the fitness of the faculty member in his professional capacity as a teacher or researcher ("cause" or "adequate cause"), (ii) duly established by procedures reflecting basic concepts of due process as they have developed in our sense of a free society. The 1940 *Statement* likewise reflects as basic principle that if academic freedom is to obtain, it must apply to *all* faculty members. Accordingly, both the 1940 and 1958 *Statements* provide that dismissal of nontenured teachers prior to the expiration of their term appointments also should be based on cause and subject to the procedural safeguards applicable to tenured faculty. In general, during the major part of the first two decades following the formulation of the 1940 *Statement,* the matter of nonrenewal of academic term appointments was essentially handled through institutionally developed standards. In some instances, they were simply subsumed under general grievance procedures; in still others there were no procedures available, specific or general.

The contours of academic due process, and of academic freedom itself in its substantive aspects, have been increasingly refined and sensitized as experience

has developed under the 1940 *Statement*. On the basis of the felt need reflected in such experience, the termination, through nonrenewal of appointment, of probationary or other nontenured faculty became an explicit focus of AAUP concern in 1957, when the Association's Committee A on Academic Freedom and Tenure developed general standards which would provide adequate procedural safeguards against nonrenewal caused by considerations directly violative of academic freedom. As so developed, these standards made available an appropriate hearing process for such cases. In appreciation of the distinction between tenure and nontenure status, and of the more complex countervailing interests presented in the latter case, these procedures provided as a prerequisite to a hearing (i) that there be preliminary consideration by a faculty committee of the teacher's allegations and for its recommendation as to the appropriateness of a full scale hearing, and (ii) that the burden of proof be on the faculty member that the nonrenewal was in fact based on considerations violative of academic freedom. Joughin, ed., *Academic Freedom and Tenure* (1969 ed.) 75; see also 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure*, sec. 10, 54 AAUP *Bull.* 448, 451 (1968). *Cf. Appendix, pp. 66-68.*

Concurrently with the recognition in the 1940 *Statement*, and subsequent pronouncements of policy, that the principles and application of academic due process cannot be limited to termination of tenure appointments, policy statements and position have traditionally reiterated that "the free search for truth and its free exposition" has a perimeter larger than teaching in the classroom itself or research in the university library or laboratory. The 1940 *Statement* itself in

specifying the ends to which tenure is a means, speaks in terms of "freedom of teaching and research and of extramural activities". It stresses that the "college or university teacher is a citizen" and that "[w]hen he speaks or writes as a citizen, he should be free from institutional censorship or discipline. . . ." See 1940 *Statement, Third Paragraph, Academic Freedom* (c), and *Interpretation 3*. (Appendix, pp. 40, 41; 43); see especially Interpretive Comments, (Appendix, pp. 45, 46). In a more developed statement formulated in 1956 on *Academic Freedom and Tenure in the Quest for National Security*, the AAUP pointed to the fact that:

> The maintenance of freedom of speech, publication, religion, and assembly (each of which is a component of intellectual freedom) is the breath of life of a democratic society. The need is greatest in fields of higher learning, where the use of reason and the cultivation of the highest forms of human expression are the basic methods. To an increasing extent, society has come to rely upon colleges and universities as a principal means of acquiring new knowledge and new techniques, of conveying the fruits of past and present learning to the community, and of transmitting these results to generations to come. Without freedom to explore, to criticize existing institutions, to exchange ideas, and to advocate solutions to human problems, faculty members and students cannot perform their work, cannot maintain their self-respect. Society suffers correspondingly. The liberty that is needed requires a freedom of thought and expression within colleges and universities, a freedom to carry the results of honest inquiry to the outside, and a freedom to influence human affairs in the same manner as other informed and unprejudiced persons do. * * *

The demand we of the academic world make for academic freedom is not made primarily for our own benefit. We enjoy the exercise of freedom; but the purposes of liberty lie in a democracy, in the common welfare. It has recently been said, "With regard to some occupations, it is eminently in the interest of society that the men concerned speak their minds without fear of retribution. . . . The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work *consists* of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines. And if *some* professors lose their positions for what they write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced."[1]

We ask, then, for the maintenance of academic freedom and of the civil liberties of scholars, not as a special right, but as a means whereby we may make our appointed contribution to the life of the commonwealth and share equitably, but not more than equitably, in the American heritage. Society has the power to destroy or impair this freedom; but it cannot do so and retain the values of self-criticism and originality fostered by higher education. (42 AAUP *Bull.* 49, 54-55 (1956)).

A reflection of the pervasive interrelationships of the various aspects and features of academic life and

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[1] Fritz Machlup, "On Some Misconceptions Concerning Academic Freedom," [41 AAUP Bull. 753 (1955)].

civil liberties of scholars, in direct relevance to the facts of the instant case, is contained in a joint formulation in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, of a statement of principles on the separate subject of college and university government. After pointing out that "Anyone [associated with an institution] affects the institution when he speaks of it in public," the formulation immediately stressed that "The right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of his own institution is a part of his right as a citizen and should not be abridged by the institution." 1966 *Statement on Government of Colleges and Universities,* 52 AAUP *Bull.* 375, 377 (1966).

General standards as to nonrenewal of probationary or other nontenured appointments again became an explicit focus of Association concern in 1964. Its Annual Meeting in that year adopted recommended policies in two pertinent areas: *First*, the date or time by which a probationary teacher should receive notice of an administration intent not to renew a contract for the following year; and *second*, the form in which such notice should be conveyed (*i.e.*, in writing). These recommendations exemplified an underlying Association position on the status of probationary faculty: "Because a probationary appointment, even though for a fixed or stated term, carries an expectation of renewal, the faculty member should be explicitly informed of a decision not to renew his appointment, in order that he may seek a position at another col-

lege or university." *Standards for Notice of Nonreappointment*, 53 AAUP *Bull.* 407 (1967); *cf. the Nonrenewal Statement,* Appendix, pp. 58, 59; see also Appendix pp. 47, 48. The recommendations thus reflected current conditions and expectations of academic life together with the Association's own particular sensitivity for academic freedom. They assure further that a faculty member who has reason to believe that the nonrenewal is in violation of his academic freedom, other constitutional rights, or academic standards, has in fact time to use established procedures before the non-renewal becomes a *fait accompli.*

Three years later, the Association's Committee A on Academic Freedom and Tenure drafted a proposed *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (the *"Nonrenewal Statement"*). The concern for procedures appropriate to probationary appointments was now made comprehensive and exclusive for the first time. Publication of this proposed Statement in the Spring, 1970, issue of the *AAUP Bulletin* (the Association's official organ) elicited many comments. Only minor modifications proved necessary in the language and format of the Statement. In this revised form, the Statement (set forth in the Appendix to this Brief) was adopted by the Council and endorsed by the Fifty-seventh Annual Meeting as Association policy, in April, 1971.

The essentials of the 1971 Statement may be summarized briefly here since they are pertinent to the position *amicus curiae* takes in the present litigation. In addition to reiterating the standards previously developed where issues of academic freedom violation are directly involved, the Statement provides that

every nontenured faculty member should (a) be advised of the substantive and procedural *standards* employed in decisions affecting renewal and tenure; (b) be advised of the *time* when such decisions are customarily made—with an opportunity to submit material relevant to his candidacy; (c) receive timely *notice in writing* of a decision not to renew or reappoint, and—*if* the faculty member himself so requests—a *statement of the reasons* (in writing if he so desires) underlying that decision; and (d) have an opportunity to request reconsideration of an adverse judgment by the decision making body. The Statement does not provide for the right *per se* to an adversary hearing on the merits, but rather contemplates a process by which a nonrenewed teacher may know the nature and rationale of a decision not to retain him, and may have a reasonable opportunity to challenge that judgment in terms of the relevant standards of the institution.

AAUP concern with nonrenewal procedures has not been confined to general statements of policy. Most recently, the Association appeared in this Court as *amicus curiae,* supporting a petition for certiorari to review the judgment of the Court of Appeals in *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969). Since this Court's denial of the petition in *Jones* (397 U.S. 991 1970)), the volume of cases implicating rights of probationary faculty has expanded markedly. Cases similar to the instant case have arisen in several circuits and the courts of several states, with conflicting resolution and consequent uncertainty for the academic community. Moreover, a general change in the economic status of higher education, as well as in the mobility of the academic profession (tenure status is in relation to individual institutions), has made even

more critical the need for observance of fair procedures in the appraisal of nontenured faculty members. The issues implicated in this case are therefore of direct concern not only to beginning or other teachers holding probationary appointments but to the very purposes and objectives of higher education itself. It is exactly where tenure or other protective status is not present or applicable that it becomes particularly necessary to assure that academic freedom and related constitutional rights, properly defined and prescribed, are in fact respected. Accordingly, the Association on behalf of all its members has a deep concern with the course of the present litigation.

SUMMARY OF ARGUMENT

This brief develops two lines of argument, one related to the particular posture of this case, and the other concerning the broad constitutional issues which the case raises. In Part I, we argue that the Court of Appeals' disposition was clearly correct on the facts of the case. The District Court's grant of summary judgment prevented respondent from proving colorable allegations that his nonrenewal abridged constitutional rights. Moreover, summary dismissal of this complaint implied that a nontenured teacher is never entitled to a statement of reasons or to an internal hearing of any nature, no matter what the circumstances of the case. Unless respondent's substantive and procedural claims had been frivolous on the face of the complaint, further proceedings in the District Court were essential.

In Part II we set forth observations and arguments concerning more generally the procedural interests of nontenured college teachers. We advance several propositions: *first*, that the status of the probationary pro-

fessor clearly merits constitutional protection; *second,* that this Court has consistently secured substantive constitutional rights of public employees, including faculty at public colleges and universities, without regard to the claimant's status under state or local law—whether tenured or not; *third,* that substantive constitutional interests of nontenured faculty would be jeopardized in the absence of procedural safeguards surrounding the nonrenewal process; and *fourth,* that the procedures appropriate to each situation should be determined by a balancing of the pertinent interests on both sides. Finally, we contend that every case of this sort warrants *some* procedural safeguards to protect vital interests of academic freedom and constitutional liberties within the academic community.

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS WAS CLEARLY CORRECT UNDER THE SPECIAL CIRCUMSTANCES OF THIS CASE.

It is essential to recognize at the outset the narrow scope of the decision below. The Court of Appeals held only that respondent was entitled to prove whether his summary termination, after five years of apparently satisfactory teaching, abridged his constitutional rights. That judgment was far from a holding that a nontenured faculty member has as a matter of course a constitutional right to a full hearing, either on campus or in court. Whatever may be the proper rule for the general case, we submit the instant case is a quite special one:

First, the complaint alleged clear violations of substantive constitutional rights. Respondent claimed he was denied continuing employment essentially as punishment for the exercise of his constitutional liberties.

These allegations, moreover, receive substantial corroboration—tantamount almost to admission—from the press release of the College President, to which recurrent reference was made in the opinion of the Court of Appeals. At least some of the acts apparently relied upon as the basis for the nonrenewal enjoy constitutional protection. The press release, for example, cited the use of respondent's name in an editorial advertisement critical of the college administration and governing board on matters of educational policy. Such a public statement would be squarely protected by *Pickering v. Board of Education,* 391 U.S. 563 (1968), even if it contained (as apparently it does not) false statements.[2] As indicated in the *Statement of Interest of Amicus,* both the 1940 *Statement of Academic Freedom and Tenure* and the 1966 *Statement on Government* likewise support the right, as a matter of academic standards, of a faculty member to speak publicly about his institution. Other acts apparently relied upon included respondent's attempt to present testimony to a legislative committee considering matters of higher education; such activities generally enjoy the protection of the First Amendment's "right of petition" clause, *cf., Edward v. South Carolina,* 372 U.S. 229 (1963).

Other factors might later be shown to have affected the College's decision to deny continuing employment in this case. Initially, however, respondent has alleged that the adverse judgment rested on constitutionally impermissible grounds. The District Court denied him an opportunity to support those allegations—thus im-

[2] Actually, respondent had disclaimed any connection with the advertisement, but the press release of the College President held nevertheless that his "*guilt by association*" could not be rejected. See Footnote 5 of the Opinion of the Court of Appeals.

plying, contrary to pertinent decisions of this Court, that even a conceded retaliation against the exercise of academic freedom or First Amendment liberties would be unreviewable. The summary judgment was thus erroneous.

Second, the absence of any internal procedures prior to nonrenewal justified the judicial inquiry mandated by the Court of Appeals. This is not a case in which the college or university has unequivocally reserved the right to terminate all contracts at will, on any ground, and without articulation of reasons. It is true the College purports not to recognize academic tenure in the manner that many institutions of higher learning do—that is, by assuring faculty that, after serving a probationary period as established by the institution, they shall be terminated only for adequate cause related, directly and substantially, to the fitness of the faculty member in his professional capacity as a teacher or researcher, duly substantiated in accordance with due process. Yet the policy under which respondent was employed creates an alternative form of employment security: "The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory, as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." (Footnote 3 of the Opinion of the Court of Appeals.). Contained as it is in the College's official Faculty Guide, this statement reflects an understanding that academic appointments, even though not "tenured" in the conventional sense, may in fact be terminated only for certain reasons.

The present case is strikingly like *Vitarelli v. Seaton*, 359 U.S. 535 (1959); an employing agency that

might have dismissed an employee summarily, without giving reasons or affording any procedural safeguards, voluntarily provided protection for certain kinds of terminations. Having established such safeguards, the agency could not dispense with them at will, even though it might have been free to hire and fire without them had it so chosen at the start: An employee who might in theory have been summarily discharged is entitled in practice, at the very least, to those protections the agency has voluntarily adopted. *Cf. Service v. Dulles*, 354 U.S. 363 (1957); *Yellin v. United States*, 374 U.S. 109 (1963).

Such analysis is reinforced by this Court's recent decision in *Bell v. Burson*, 402 U.S. 535 (1971). It was acknowledged at the outset that a state might require every applicant for a driver's license to have liability insurance or post security. But once the decision had been made to subject only certain licensees to such requirements, the relationship could not constitutionally be terminated in a particular case without a hearing. That conclusion, declared a unanimous Court, is "but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" *Bell v. Burson, supra*, 402 U.S. at 539. Surely the opportunity of continuing employment in a college teaching post deserves safeguards at least comparable to those afforded holders of drivers' licenses.

The *Vitarelli* analysis applies with particular force in the instant case. Odessa College—presumably in order to attract and retain the services of teachers—provided explicitly that faculty members will forfeit their "permanent tenure" only under three conditions.

None of the three conditions were established in this case. As suggested above, the only activities cited by the College President which might possibly warrant a termination under the policies the College had bound itself to follow enjoy full constitutional protection. Any reliance upon such activities as the basis for termination would infringe basic constitutional liberties and violate academic freedoms which this Court has jealously guarded through a long line of decisions. Reliance upon such conduct without any sort of hearing or inquiry would, moreover, constitute a basic denial of due process.

The case, then, is not one of summary nonrenewal for which the employer's own policies require no explanation. Nor is this a case in which a rule or regulation of general applicability proscribes specific employee conduct and a violation is conceded in the particular case, *cf. Beilan v. Board of Education,* 357 U.S. 399 (1958); *Lerner v. Casey,* 357 U.S. 468 (1958); *Nelson v. County of Los Angeles,* 362 U.S. 1 (1960). (Were they apposite, *amicus curiae* would argue these decisions are inconsistent with later pronouncements of this Court and hence can no longer be relied upon. But since they are readily distinguishable, such extended analysis seems unnecessary here.)

On the contrary, this case is governed by *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956). As indicated *infra,* Slochower's status as a tenured faculty member was apparently not significant to a decision that his summary discharge abridged constitutional liberties.

Here as in *Slochower,* no inquiry whatever has been made whether the acts apparently relied upon as the basis for termination demonstrate unfitness to hold a

faculty position. Had the Texas Board declared in terms that any professor who misses a class to testify in Austin forfeits his position, this might be a different case—though such a proscription would be constitutionally vulnerable, *cf. Pickering v. Board of Education, supra.* The present case is squarely governed by the concluding paragraph of the *Slochower* opinion:

> This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law. (350 U.S. at 559.)

The continuing vitality and broad scope of *Slochower* are attested by this Court's recent decision in *Connell v. Higginbotham,* 403 U.S. 207 (1971), striking down part of a Florida statutory loyalty oath requirement. Citing *Slochower,* the Court held that the "belief" provision of the oath "falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." 403 U.S. at 208. This judgment, as well as the *Slochower* rationale, is as applicable to probationary as it is to tenured faculty. As indicated by *Whitehill v. Elkins,* 389 U.S. 54 (1967), it relates as well to applicants for public employment. The protection of persons *holding continuing,* if nontenured, *positions* should now be beyond doubt.

Indeed, if anything the present case is *a fortiori* from *Slochower* in this regard. For the conduct cited

as the basis for Slochower's dismissal (invoking the self-incrimination privilege before a legislative investigating committee) was not within the scope of his constitutional rights as a government employee; the only apparently relevant conduct of respondent seems well within the zone of his First Amendment freedoms.

For the moment, it is unnecessary to determine whether respondent's activities lay beyond the reach of administration censure or sanction. Until some adequate inquiry has been made into those activities, their specific nature, and their relevance to respondent's fitness to teach or to serve as a faculty member, any judgment about the constitutionality of a dismissal based upon those activities would be premature. The Court of Appeals has said that further inquiry into these matters is essential. That judgment follows from the apposite precedents of this Court. Accordingly, a remand would be appropriate for this reason alone.

The disposition of this case, moreover, inherently requires a careful scrutiny of particular facts and circumstances. The availability and extent of procedural safeguards for termination or denial of government benefits are particularized questions, as this Court has consistently held. "[C]onsideration of what procedures due process may require under any given set of circumstances," declared the Court in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." This approach was recently reinforced in *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). (*Cf. Adler v. Board of Education*, 342 U.S. 485, 497-508 (1952) (Frankfurter, J., dissenting)).

The mandate to consider the distinctive circumstances of the case, to balance individual against institutional interests, makes particularly inappropriate the disposition of a claim such as respondent's on summary judgment. For this reason, as well as others outlined above, the Court of Appeals was clearly right to remand the case for development of a fuller record. To attempt a balancing of conflicting interests at so early a stage, with so little hard data, would involve largely uninformed speculation. To do so on a matter and issues of developing critical importance to the academic community would be particularly inappropriate.

II. THE CONSTITUTIONAL RIGHTS AND LIBERTIES OF NONTENURED FACULTY MEMBERS DEPEND FOR ADEQUATE PROTECTION UPON PROCEDURAL SAFEGUARDS

For the reasons suggested above, broad aspects of the rights of nontenured professors are not necessarily before the Court at this time. The Court of Appeals, however, thought it appropriate for the guidance of the District Court to discuss those issues. Accordingly, the Association's views may also be appropriate in the event this Court reaches those broader questions. At the outset, we should indicate substantial agreement with the central premise of the opinion below: That recourse to a statement of reasons and to an internal hearing in a nonrenewal case, and the specific nature of such a hearing, may not be determined on rigid, doctrinaire lines, but should reflect the special needs of the situation and the range of individual and institutional interests. We contend, further, that certain basic safeguards are essential to protect and ensure the constitutional liberties, as well as the academic freedom, of nontenured professors. As indicated in the *Statement of Interest of Amicus,* in the development

of its various pertinent policy statements, the Association has endeavored to reflect a similar commitment to careful weighing of often opposed, sometimes finely balanced, interests.

A. The Interest or Status of the Nontenured College Teacher Merits Constitutional Protection

This Court has consistently rejected the illusory distinction between "rights" and "privileges." See, *e.g., Bell v. Burson,* 402 U.S. 535 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 *Harv. L. Rev.* 1439 (1968). Instead, the pivotal question in each case involving the denial or termination of government benefits has been whether the status or interest involved was a sufficient "entitlement" to merit constitutional protection. A host of relations between citizen and government have received such recognition in recent cases—the license to drive an automobile, receipt of welfare benefits or unemployment compensation, admission to the bar, tenancy in public housing projects, and many others. Indeed, in no recent case has this Court found any such interest so gratuitous or so frivolous that government was free to condition it arbitrarily or terminate the relationship in disregard of substantive and procedural fairness.

Against this background, there can be little doubt that a teaching position in a college or university constitutes an entitlement of a rather high order—perhaps, in fact, more clearly deserving of constitutional solicitude than many relationships to which this Court has afforded substantial protection. *Cf. Shelton v. Tucker,* 364 U.S. 479 (1960) and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). Confusion has arisen,

however, over the particular interest of the nontenured teacher. Several courts have suggested, *e.g., Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); *Freeman v. Gould Special District of Lincoln County,* 405 F.2d 1153 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969) that such persons lack a sufficient "expectancy" in continuing employment to challenge the agency's power to deny reappointment at will, with or without good cause, with or without giving reasons. On this basis probationary employees have been held without recourse to the federal courts to establish claims that an unexplained dismissal was, for example, a covert retaliation for the exercise of clearly protected First Amendment rights.

The distinction reflects a basic misunderstanding of the status and expectation of the nontenured teacher. As indicated in the *Statement of Interest of Amicus,* and as other courts have recognized, *e.g., Pred v. Board of Public Instruction,* 415 F.2d 851 (5th Cir. 1969); *Drown v. Portsmouth School Dist.,* 435 F.2d 1182 (1st Cir. 1970) *cert. denied,* 402 U.S. 972 (1971); *Roth v. Board of Regents,* 310 F. Supp. 972 (W. D. Wis. 1970), *aff'd.* ——F.2d—— (7th Cir. 1971), petition for *certiorari* filed August 3, 1971, service in a year-to-year employment relationship implies certain expectations as to renewal. As the Court of Appeals for the First Circuit observed in the *Drown* case: "The teacher, particularly one at the outset of his career, is in the position of having invested in preparation for a career which depends mainly on the willingness of public bodies to employ him. Such willingness . . . is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher." 435 F.2d at 1184. A similar dissipation of willingness can be expected of

private as well as of public colleges and universities. There is not only involved the teacher's livelihood; academic freedom itself depends upon his ability to continue the practice of his profession with minimal risk and fear of wholly arbitrary termination of his opportunity to do so.

The expectation of continued employment may not always exist of course; its specific nature may also vary. Some academic positions—certain visiting professorships, special lectureships, and teaching assistantships—are understood to be "one year appointments" in the real rather than the technical sense. The holder of such a position would not ordinarily claim that failure to receive a renewal contract constituted a "termination"—even though in occasional and special cases such a person might in fact be asked to remain on for a second year. Positions of this kind are generally like clerkships to Justices of this Court; while a few clerks may expect or even be asked at the outset to remain for a second year, most simply assume that the appointment is for a single Term and regularly seek post-clerkship employment during that Term.

For most faculty members on the professorial ladder, however, the expectation is wholly different: Even though the contract itself is often for a single year at a time, subject to renewal or extension, the expectation in most institutions of higher learning is that the continuation of employment will be determined on the basis of an appropriate review and appraisal of the faculty member's performance and of his potential contribution to the institution and the academic unit of which he is a member. Because of this widely shared understanding, a termination without such review or appraisal severely frustrates the nontenured professor's expectations and aspirations.

Moreover, the interest of the probationary public employee has elicited judicial inquiry whenever dismissal was based upon a stated and constitutionally invalid ground such as a denial of First or Fourteenth Amendment rights. The resulting distinction has created a paradox: If the employing agency terminates a service by giving a constitutionally vulnerable reason, judicial review has long been available despite the probationary nature of the relationship. If, however, the agency gave no reason, a decision not to renew was as a practical matter insulated from judicial inquiry. Administrative candor was thus penalized, with the result that valid and invalid grounds alike were best left unstated by the administrator who wished to keep out of court. Meanwhile, the injury to the person terminated *without* explanation and *without* procedural safeguards may well have been the graver, since speculation of prospective future employers could run the full gamut of possible causes for nonretention. In any event, by finding that discharge for a *constitutionally invalid* reason justified intervention, the courts have implicitly recognized that the probationer's status merits constitutional protection.

Probationary status in higher education is especially deserving of solicitude, since academic freedom is substantially at stake. Frequently, it is directly involved in particular cases. Generally, to the extent that appropriate protection from arbitrary termination is not provided, to that extent the exercise of academic freedom is inhibited and diminished. In a long line of decisions this Court has underscored the essentiality of liberty of thought and inquiry in the colleges and universities of this country. The principle is forcefully

stated in *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

For the reasons indicated in the *Statement of Interest of Amicus,* the Association concurs. *Supra,* pp. 5 and 6.

To a degree, the academic freedom of tenured members of the faculty is protected by internal remedies. Where the protection of tenure is absent, however—as for all faculty members at some institutions, and junior or recently appointed faculty at most institutions—the internal remedies are either uncertain or unavailable. Yet the termination of a nontenured assistant professor for the exercise of protected rights jeopardizes academic freedom no less than the dismissal of a tenured faculty member on similar grounds. Thus the basic interests of academic freedom, as well as particular interests of individual teachers, call for legal protection of nontenured status. *Cf.* Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 *Duke L.J.* 841.

B. This Court has Recognized Substantive Constitutional Rights of Public Employees Generally and Faculty Specifically Without Regard to the Claimant's Status Under State or Local Law.

In the recent evolution of substantive constitutional rights of government employees, including professors, the distinction between permanent and probationary status under state or local law has played little or no

part. Decisions of this Court striking down loyalty oaths and disclaimers as conditions of public employment, for example, have involved some plaintiffs already tenured or permanent, others in probationary status, and still others who were merely applicants for initial positions. In various oath disclaimer cases —*Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Baggett v. Bullitt,* 377 U.S. 360 (1964); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Whitehill v. Elkins,* 389 U.S. 54 (1967); and *Connell v. Higginbotham,* 403 U.S. 207 (1971)—no attention appears to have been given to the status of the person challenging the constitutionality of the requirement. In *Whitehill,* in fact, the plaintiff had merely been offered a visiting lecturer appointment, which he was unwilling to accept if contingent upon signing the oath challenged in the suit.

The permanent-probationary (or nontenured) distinction has been similarly irrelevant in analogous lines of decision affirming the constitutional rights of public employees. Protection of the right to criticize policies of one's superiors or the employing agency, *Pickering v. Board of Education, supra,* is available no less to nontenured than to tenured employees. Freedom from onerous and burdensome restrictions on associations and extra-curricular activities, *Shelton v. Tucker,* 364 U.S. 479 (1960), is not confined to permanent employees. Recent decisions of lower federal courts have also deemed this distinction largely irrelevant in a variety of contexts—protection against reprisal for union affiliation or activity, *McLaughlin v. Tilendis,* 398 F.2d 287 (7th Cir. 1968); academic freedom to teach in the classroom without fear of censorship or reprisal, *Parducci v. Rutland,* 316 F. Supp. 352

(M.D. Ala. 1970); *Hetrick v. Martin,* 322 F. Supp. 545 (E.D. Ky. 1971); and other comparable safeguards.

However significant the permanent-probationary distinction may be as a matter of state or local administrative and contract law, it has been properly rejected as a measure of the scope of constitutional rights and liberties. The underlying principle is the essence of the doctrine of unconstitutional conditions: While government may have general powers to deny employment outright to applicants, or even to terminate that relationship at will, it may not use such power to invade or erode the constitutional rights and liberties of the applicant or incumbent, or to impair basic tenets of academic freedom which protect higher education. See *Sherbert v. Verner, supra; Speiser v. Randall,* 357 U.S. 513 (1958). The enforcement of this principle properly disregards for these purposes the local law classification of the employment relationship; an employee's *constitutional* right to speak, publish, and worship freely, or to be free of racial or other arbitrary discrimination, surely cannot be qualified by the special contractual relationship with an employing agency. Thus the substantive constitutional rights and liberties of tenured and nontenured public workers are essentially coextensive.[3]

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[3] There is one possible exception to this generalization. In *Nelson v. County of Los Angeles, supra,* the Court apparently distinguished the cases of Globe (a temporary employee) and Nelson (a permanent employee of the same County). While Nelson's case was affirmed by an equally divided Court without opinion, Globe's discharge for refusing to testify before a Congressional subcommittee was affirmed by a 5-3 margin. But it would be hazardous to infer that one member of the Court felt Nelson entitled to greater protection than Globe. Also, in regard to both employees, the lower courts and this Court acted to affirm previous administrative action

C. The Substantive Constitutional and Academic Freedom Interests of Nontenured Faculty Would Be Gravely Jeopardized Without Procedural Safeguards for Nonrenewal.

If nontenured as well as tenured teachers have substantial substantive rights and liberties, then it follows that safeguards must exist to protect those interests *in practice*. For without such safeguards, resort to unexplained and unreviewable summary termination could easily conceal clearly unconstitutional actions. If an administrator could implement his racial bias by denying reappointment to a black (or white) worker without stating any reasons, if a union officer on temporary status could be terminated without explanation, or if a persistent critic of official policy could be summarily nonrenewed, then the substantive civil rights and liberties of government employees would exist *in vacuo*—save to the extent procedural safeguards were prescribed by statute or regulation, or the responsible officials were either candid or careless enough to state reasons where none were required.

The vital relationship between substantive rights and procedural safeguards has been forcefully described by Judge Doyle, in *Roth v. Board of Regents*, 310 F. Supp. 972, 975-76 (W.D. Wis. 1970), *aff'd.* —— F.2d —— (7th Cir. 1971), pet. for *cert.* filed August 3, 1971:

> If a decision not to renew the employment contract of a non-tenured university professor may

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or proceedings. More important, in view of the equal division in Nelson's case, the opinion reviewing Globe's case contains no comparative comments which might illumine the difference (if any) between the constitutional claims of the temporary and permanent county workers. This one case, then, seems hardly adequate to justify such a distinction. Nor does there appear to be any other precedent supporting it. The whole course of this Court's decisions over the past decade involving rights of government employees, indeed, argues against any such distinction.

be based consciously and deliberately on the fact that he has written a scholarly letter to the newspaper in support of the President's policy on Viet Nam, or on the fact that he is white, or on the fact that he is a Protestant, or on the fact that he is a Republican, and if the decision may be based on the university president's belief that the professor physically struck a student at a certain time and place, whereas in fact the professor was not present at that time and place and the incident never occurred, and if there need be no reasoned basis whatever for the decision, then it may be concluded that the Constitution of the United States affords him no substantive protection. If he enjoys no substantive protection under the Constitution—that is, if the decision not to renew may be based upon any reason or may be based upon no reason—then it also follows that he need be afforded no procedural protection by the Constitution; to require the university administration to state the reason for the decision, or to state that there is no reason for the decision, or to provide an opportunity to the professor to be heard, would serve no purpose.

On the other hand, if the Constitution of the United States forbids a decision consciously and deliberately based on the professor's otherwise protected speech activity, or his race, or his religion, or his political affiliation, then this substantive right may require procedural protection . . . .

Also, if the Constitution forbids a decision based upon a wholly false assumption (for example, that the professor struck the student), or if it forbids a decision which is wholly unreasoned, then this substantive right may also require procedural protection.

As Judge Doyle's opinion indicates, the substantive rights and liberties which this Court has secured to nontenured public employees are only as strong in practice as the procedural safeguards available upon termination or nonrenewal. The relationship is most significant in higher education, where the Court's special concern for academic freedom is at stake. See also Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 *Duke L. J.,* 841, 869. It would be anomalous to hold that while all faculty members enjoy academic freedom in the classroom and outside, only tenured faculty are effectively able to vindicate or exercise that freedom. Precisely because tenured faculty do generally enjoy a higher level of *internal* protection, nontenured professors may need stronger *external* protection of the kind the Court of Appeals found appropriate in this case. Otherwise, the result might well be to create by default two classes of basic substantive rights within the academic profession.

D. A Balancing of Relevant Interests of Individual and Institution Justifies Procedural Safeguards for Nontenured Faculty.

Particular claims to procedural safeguards must be appraised by balancing relevant interests, *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970); *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961); *cf. Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960). The process varies not only from context to context but from one particular case to another. While we contend that in every case involving nonrenewal of a probationary faculty member, *some* procedural safeguards are appropriate, the *precise extent* of protection will vary according to the particular interests implicated. It is for this reason, among others, that we

urge that the Court of Appeals was correct in remanding the case for development of the kind of record that would permit the balancing process mandated by this Court in *Goldberg v. Kelly, supra.*

Despite the variable and varying nature of the interests, certain general guidelines may be formulated. The Association's *Statement on Nonrenewal Procedures* (set forth in the Appendix to this Brief), like previous statements, seeks to balance conflicting interests in much the manner this Court has prescribed in *Kelly.* The conclusion—that the balance favors some procedural safeguards for nonretention or nonrenewal—seems readily applicable to the constitutional context as well. Accordingly, we may review the opposing interests here as they bear on the instant litigation and similar cases now in the lower courts.

Interests in Favor of Safeguards. The *Nonrenewal Statement,* in discussing the interests that Association experience indicates as favoring the giving of reasons to a terminated faculty member who requests them, states:

> . . . He may be honestly unaware of the reasons for a negative decision, and the decision may be based on a judgment of shortcomings which he could easily remedy if informed of them. A decision not to renew an appointment may be based on erroneous information which the faculty member could readily correct if he were informed of the basis for the decision. Again, the decision may be based on considerations of institutional policy or program development which have nothing to do with the faculty member's competence in his field, and if not informed of the reasons he may mistakenly assume that a judgment of inadequate per-

formance on his part has been made. In the face of a persistent refusal to supply the reasons, a faculty member may be more inclined to attribute improper motivations to the decision-making body or to conclude that its evaluation has been based upon inadequate consideration. If he wishes to request a reconsideration of the decision, or a review by another body, his ignorance of the reasons for the decision will create difficulties both in reaching a decision whether to initiate such a request and in presenting his case for reconsideration or review. (Appendix, p. 63.)

In a recent case involving secondary school teacher nonrenewals, the Court of Appeals for the First Circuit in *Drown v. Portsmouth School District, supra,* at 1184-1185, despite its reluctance to mandate broad procedural safeguards in the context of that case, has recently recognized the same interests:

From the point of view of the teacher, such notice would give him the opportunity informally to correct a decision made on the basis of mistaken or false facts. Moreover, he might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. Additionally, the teacher would have the extra benefit of knowing where his performance failed to live up to expectations—a benefit that may not be constitutionally required but which is surely desirable. Finally, if the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

Several cautions should be noted—cautions which help to refine the balance. Many terminations are easily explained—for example, because of the phasing out or contraction of a program or department, or a sudden change in the teacher's own professional field. In other cases, the nonrenewed faculty member himself may not desire a statement of reasons and will thus not make the request. As the Association's *Nonrenewal Statement* notes:

> If he is informed of them [the reasons] he can be placed under an obligation to divulge them to the appointing body of another institution if it inquires why he is leaving his present position. Similarly, a written record is likely to become the basis for continuing responses by his former institution to prospective appointing bodies and may thus jeopardize his chances for obtaining positions over an extended period. (Appendix, p. 63.)

These interests of the individual faculty member are not necessarily confined to the giving of reasons for nonrenewal. After a statement of reasons is received, these same interests may warrant additional procedures. Certainly, where the faculty member has reason to believe that nonrenewal of his appointment was based on considerations violative of his academic freedom, an opportunity should be available to him to establish his claim. As indicated and described in the *Statement of Interest of Amicus,* academic procedures recognizing both the interests of the individual faculty member and of the institution were developed some years ago for this purpose. These procedural standards have been reiterated and are set forth in detail in the *Nonrenewal Statement* included in the Appendix. (Pages 66-68).

Where the gravamen of the grievance is not directly based on academic freedom but relates rather to adequacy of consideration of the faculty member's qualifications, the additional procedures recommended by the *Nonrenewal Statement* call for a determination by a review committee, upon petition of the faculty member, whether the decision of the appropriate faculty body was the result of adequate consideration in terms of the relevant standards of the institution. If it concludes that such consideration was not given, its appropriate response would not be to substitute its own judgment on the merits but to recommend reconsideration by the appropriate faculty body.

Interests of the Institution. AAUP has attempted to articulate these interests in its *Nonrenewal Statement*:

> A major responsibility of the institution is to recruit and retain the best qualified faculty within its means. In a matter of such fundamental importance, the institution, through the appropriate faculty agencies, must be accorded the widest latitude consistent with academic freedom and the standards of fairness . . . .
>
> At many institutions, moreover, the procedures of evaluation and decision may make it difficult, if not impossible, to compile a statement of reasons which precisely reflects the basis of the decision. When a number of faculty members participate in the decision, they may oppose a reappointment for a variety of reasons, few or none of which may represent a majority view. To include every reason, no matter how few have held it, in a written statement to the faculty member may misrepresent the general view and damage unnecessarily both the faculty member's morale and his professional future. (Appendix, pp. 62 and 64.)

However, even the Court of Appeals for the First Circuit, in the *Drown* case, recognized that:

> From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so. *E.g.* Wash. Rev. Code Ann. § 28.67.070 (1964). As to access to administrative evaluations, we would assume that, since part of their objective is to help the teacher improve, their content is made known to the teacher as a matter of policy. Access as of right has been granted in a number of states. *E.g.*, Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1969). Finally, while access by a teacher to an administrator's frank appraisal of his ability might lead to embarrassment and friction if the teacher-administrator relationship were to continue, such a consideration is moot when the teacher has not been rehired. The relationship could be further impaired only in the unlikely case that the decision not to rehire were reversed despite negative reports; and in such a case, the avoidance of an unjustified non-retention must outweigh the danger of disharmony. [Footnotes omitted.] (435 F.(2d) at 1185)

Clearly a commitment to fair procedures for nonrenewals does not obligate the college or university to confer "instant tenure" upon probationary teachers. There is no occasion to abolish or undermine the distinction between tenure and nontenure status—a dis-

tinction which is fundamental to AAUP policy. The grounds on which a nonreappointment may rest are far broader than the narrow range of conduct that may constitute "cause" for dismissal of a tenured professor. As the *Nonrenewal Statement* explains:

> Complaints of inadequate consideration are likely to relate to matters of professional judgment, where the department or departmental agency should have primary authority. For this reason, Committee A believes that the basic functions of the review committee should be to determine whether adequate consideration was given to the appropriate faculty body's decision and, if it determines otherwise, to request reconsideration by that body.
>
> It is easier to state what the standard "adequate consideration" does not mean than to specify in detail what it does. It does not mean that the review committee should substitute its own judgment for that of members of the department on the merits of whether the candidate should be reappointed or given tenure. The conscientious judgment of the candidate's departmental colleagues must prevail if the invaluable tradition of departmental autonomy in professional judgments is to prevail. The term "adequate consideration" refers essentially to procedural rather than substantive issues: Was the decision conscientiously arrived at? Was all available evidence bearing on the relevant performance of the candidate sought out and considered? Was there adequate deliberation by the department over the import of the evidence in the light of the relevant standards? Were irrelevant and improper standards excluded from

consideration? Was the decision a *bona fide* exercise of professional academic judgment? These are the kinds of questions suggested by the standard "adequate consideration."

If in applying this standard the review committee concludes that adequate consideration was not given, its appropriate response should be to recommend to the department that it assess the merits once again, this time remedying the inadequacies of its prior consideration. (Appendix, pp. 68-69.)

The Association believes that such a procedure would recognize the legitimate interest of faculty, without entailing—to quote the *Nonrenewal Statement*—the "risk that the important distinction between tenure and probation will be eroded." (Appendix, page 62.)

Interests of the college or university—flexibility in the making of academic personnel judgments, and the maintenance of high standards in employment and retention of faculty—must be weighed carefully in determining the procedures appropriate to such cases. The effect upon general review of faculty performance, the difficulty of articulating reasons for nonreappointment or of holding a hearing, and other factors should be weighed. But considerations of administrative convenience or efficiency, or the cost of more elaborate procedures, may not be allowed to defeat the constitutional interests of nontenured faculty, *cf. Cooper v. Aaron,* 358 U.S. 1 (1958).

In view of the particularity of the balancing process required by experience and by this Court's decisions, and the absence of an adequate record in this case, we feel it would be as inappropriate for us to specify procedures in the present posture of the case as we feel

it was inappropriate for the District Court to foreclose any further proceedings in advance of developing a record. Instead, we have undertaken to suggest (as did the Court of Appeals) the kinds of considerations generally relevant and applicable in cases of this type and which have proved desirable in the experience of the academic community. It is the Association's conviction that the law in this area has begun to evolve and should continue to evolve through relevant cases under this Court's general guidance—based upon a broad recognition that the academic freedom and constitutional rights of nontenured and probationary faculty members do require *some* procedural safeguards in *every* case.

CONCLUSION

For the reasons outlined in this brief, *amicus curiae* respectfully urges that the judgment of the Court of Appeals be affirmed, in order to permit further proceedings in the District Court.

Respectfully submitted,

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APPENDIX

A. Academic Freedom and Tenure

1940 STATEMENT OF PRINCIPLES AND INTERPRETIVE COMMENTS

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges during 1969.

The following organizations officially endorsed the 1940 Statement in the years indicated.

Association of American Colleges 1941
American Association of University Professors 1941
American Library Association (adapted for librarians) 1946
Association of American Law Schools 1946
American Political Science Association 1947
American Association of Colleges for Teacher Education 1950
American Association for Higher Education 1950
Eastern Psychological Association 1950
American Philosophical Association:
Western Division 1952
Eastern Division 1953
Southern Society for Philosophy and Psychology 1953
American Psychological Association 1961
American Historical Association 1961

Modern Language Association of America 1961
American Economic Association 1962
American Farm Economic Association 1962
American Philosophical Association, Pacific Division 1962
Midwest Sociological Society 1963
Organization of American Historians 1963
American Philological Association 1963
American Council of Learned Societies 1963
Speech Association of America 1963
American Sociological Association 1963
Southern Historical Association 1963
American Studies Association 1963
Association of American Geographers 1963
Southern Economic Association 1963
Classical Association of the Middle West and South ..1964
Southwestern Social Science Association 1964
Archaeological Institute of America 1964
Southern Management Association 1964
American Educational Theatre Association 1964
South Central Modern Language Association 1964
Southwestern Philosophical Society 1964
Council for the Advancement of Small Colleges 1965
Mathematical Association of America 1965
Arizona Academy of Science 1965
American Risk and Insurance Association 1965
Academy of Management 1965
American Catholic Historical Association 1966
American Catholic Philosophical Association 1966
Association of State Colleges and Universities 1966
Association of Education in Journalism 1966
Western History Association 1966
Mountain-Plains Philosophical Conference 1966
Society of American Archivists 1966
Southeastern Psychological Association 1966
Southern Speech Association 1966
American Association for the Advancement of Slavic Studies 1967
American Mathematical Society 1967
College Theology Society 1967

Council on Social Work Education 1967
American Association of Colleges of Pharmacy 1967
American Academy of Religion 1967
American Catholic Sociological Society 1967
American Society of Journalism School Administrators 1967
John Dewey Society for the Study of Education and Culture 1967
South Atlantic Modern Language Association 1967
American Finance Association 1967
Catholic Economic Association 1967
United Chapters of Phi Beta Kappa 1968
American Society of Christian Ethics 1968
American Association of Teachers of French 1968
Appalachian Finance Association 1968
Association of Teachers of Chinese Language and Culture 1968
American Society of Plant Physiologists 1968
University Film Association 1968
American Dialect Society 1968
American Speech and Hearing Association 1968
Association of Social and Behavioral Scientists 1968
National College Physical Education Association for Men 1969
American Real Estate and Urban Economics Association 1969
History of Education Society 1969
Council for Philosophical Studies 1969
American Physicists Association 1969
American Musicological Society 1969
American Association of Teachers of Spanish and Portuguese 1969
Texas Junior College Teachers Association 1970
College Art Association of America 1970
Society of Professors of Education 1970
American Anthropological Association 1970
The American Association of Theological Schools 1970
American Association of Schools and Departments of Journalism 1971

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights. [1] *

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. [2] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. [3]

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* Numbers in brackets refer to Interpretive Comments which follow.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman. [4]

Academic Tenure

(a). After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, [5] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even

though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. [6] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. [7]

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have. [8]

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution. [9]

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Interpretations

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8, 1940, the

following interpretations of the 1940 *Statement of Principles on Academic Freedom and Tenure* were agreed upon:

1. That its operation should not be retroactive.

2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.

3. If the administration of a college or university feels that teacher has not observed the admonitions of Paragraph (c) of the section on *Academic Freedom* and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on *Academic Tenure.* In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Interpretive Comments

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure *with leading educational associations and with individual faculty members and administrators, a Joint Committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the Joint Committee felt the preferable approach was to formulate interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.*

The Committee submitted to the two Associations for their consideration the following "Interpretive Comments." These interpretations were approved by the

Council of the American Association of University Professors in April, 1970, and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 *Statement of Principles on Academic Freedom and Tenure* have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance; understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that Association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 Statement, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 Statement is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 Statement; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian* v. *Board of Regents* 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the 1940 Statement on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both Associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to the professor in his utterances as a citizen, in the exercise of his responsibilities to the institution and students, and in his conduct when resigning from his institution or when undertaking government-sponsored research. Of particular relevance is the *Statement on Professional Ethics*, adopted by the Fifty-second Annual Meeting of the AAUP as Association policy and published in the *AAUP Bulletin* (Autumn, 1966, pp. 290-291).

2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for the teacher to avoid persistently intruding material which has no relation to his subject.

3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.

4. This paragraph is the subject of an Interpretation adopted by the sponsors of the 1940 Statement immediately following its endorsement which reads as follows:

> If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citi-

zens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph (c) of the 1940 Statement should also be interpreted in keeping with the 1964 *Committee A Statement on Extramural Utterances* (*AAUP Bulletin*, Spring, 1965, p. 29) which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph V of the *Statement on Professional Ethics* also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

> As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary as well as to the tenured teacher,

but also to all others, such as part-time and teaching assistants, who exercise teaching responsibilities.

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of his specific title.*

6. In calling for an agreement "in writing" on the amount of credit for a faculty member's prior service at other institutions, the Statement furthers the general policy of full understanding by the professor of the terms and conditions of his appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution.

7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 Statement with respect to the termination of services of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the *Standards for Notice of Nonreappointment,* endorsed by the

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* For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," *AAUP Bulletin,* Autumn, 1966, pp. 280-282.

Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

(1) *Not later than March 1 of the first academic year of service,* if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) *Not later than December 15 of the second academic year of service,* if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and individuals, are described in the *Statement on Recruitment and Resignation of Faculty Members,* as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during his probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the *Recommended Institutional Regulations on Academic Freedom and Tenure,* prepared by the American Association of University Professors.

9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the *Statement on Procedural Standards in Faculty Dismissal Proceedings*, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 Statement is silent.

The 1958 Statement provides: "Suspension of the faculty member during the proceedings involving him is justified only if immediate harm to himself or others is threatened by his continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

B. 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings

The following *Statement on Procedural Standards in Faculty Dismissal Proceedings* was prepared by a joint committee representing the Association of American Colleges and the American Association of University Professors and was approved by these two associations at their annual meetings in 1958. It supplements the 1940 *Statement of Principles on Academic Freedom and Tenure* by providing a formulation of the "academic due process"

that should be observed in dismissal proceedings. The exact procedural standards here set forth, however, "are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure,* but are presented rather as a guide. . . ."

Introductory Comments

Any approach toward settling the difficulties which have beset dismissal proceedings on many American campuses must look beyond procedure into setting and cause. A dismissal proceedings is a symptom of failure; no amount of use of removal process will help strengthen higher education as much as will the cultivation of conditions in which dismissals rarely if ever need occur.

Just as the board of control or other governing body is the legal and fiscal corporation of the college, the faculty are the academic entity. Historically, the academic corporation is the older. Faculties were formed in the Middle Ages, with managerial affairs either self-arranged or handled in course by the parent church. Modern college faculties, on the other hand, are part of a complex and extensive structure requiring legal incorporation, with stewards and managers specifically appointed to discharge certain functions.

Nonetheless, the faculty of a modern college constitute an entity as real as that of the faculties of medieval times, in terms of collective purpose and functions. A necessary pre-condition of a strong faculty is that it have first-hand concern with its own membership. This is properly reflected both in appointments to and in separations from the faculty body.

A well-organized institution will reflect sympathetic understanding by trustees and teachers alike of their respective and complementary roles. These should be spelled out carefully in writing and made available to all. Trustees

and faculty should understand and agree on their several functions in determining who shall join and who shall remain on the faculty. One of the prime duties of the administrator is to help preserve understanding of those functions. It seems clear on the American college scene that a close positive relationship exists between the excellence of colleges, the strength of their faculties, and the extent of faculty responsibility in determining faculty membership. Such a condition is in no wise inconsistent with full faculty awareness of institutional factors with which governing boards must be primarily concerned.

In the effective college, a dismissal proceeding involving a faculty member on tenure, or one occurring during the term of an appointment, will be a rare exception, caused by individual human weakness and not by an unhealthful setting. When it does come, however, the college should be prepared for it, so that both institutional integrity and individual human rights may be preserved during the process of resolving the trouble. The faculty must be willing to recommend the dismissal of a colleague when necessary. By the same token, presidents and governing boards must be willing to give full weight to a faculty judgment favorable to a colleague.

One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure* and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 Statement and standards which have developed in the experience of academic institutions.

This statement deals with procedural standards. Those recommended are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure,* but are presented rather as a guide to be used according to the nature and traditions of particular institutions in giving effect to both faculty tenure rights and the obligations of faculty members in the academic community.

Procedural Recommendations

1. Preliminary Proceedings Concerning the Fitness of a Faculty Member

When reason arises to question the fitness of a college or university faculty member who has tenure or whose term appointment has not expired, the appropriate administrative officers should ordinarily discuss the matter with him in personal conference. The matter may be terminated by mutual consent at this point; but if an adjustment does not result, a standing or *ad hoc* committee elected by the faculty and charged with the function of rendering confidential advice in such situations should informally inquire into the situation, to effect an adjustment if possible and, if none is effected, to determine whether in its view formal proceedings to consider his dismissal should be instituted. If the committee recommends that such proceedings should be begun, or if the president of the institution, even after considering a recommendation of the committee favorable to the faculty member, expresses his conviction that a proceeding should be undertaken, action should be commenced under the procedures which follow. Except where there is disagreement, a statement with reasonable particularity of the grounds proposed for the dismissal should then be jointly formulated by the president and the faculty committee; if there is disagreement, the president or his representative should formulate the statement.

2. Commencement of Formal Proceedings

The formal proceedings should be commenced by a communication addressed to the faculty member by the president of the institution, informing the faculty member of the statement formulated, and informing him that, if he so requests, a hearing to determine whether he should be removed from his faculty position on the grounds stated will be conducted by a faculty committee at a specified time and place. In setting the date of the hearing, sufficient time should be allowed the faculty member to prepare his defense. The faculty member should be informed, in detail or by reference to published regulations, of the procedural rights that will be accorded to him. The faculty member should state in reply whether he wishes a hearing and, if so, should answer in writing, not less than one week before the date set for the hearing, the statements in the president's letter.

3. Suspension of the Faculty Member

Suspension of the faculty member during the proceedings involving him is justified only if immediate harm to himself or others is threatened by his continuance. Unless legal considerations forbid, any such suspension should be with pay.

4. Hearing Committee

The committee of faculty members to conduct the hearing and reach a decision should either be an elected standing committee not previously concerned with the case or a committee established as soon as possible after the president's letter to the faculty member has been sent. The choice of members of the hearing committee should be on the basis of their objectivity and competence and of the regard in which they are held in the academic community. The committee should elect its own chairman.

5. Committee Proceeding

The committee should proceed by considering the statement of grounds for dismissal already formulated, and the faculty member's response written before the time of the hearing. If the faculty member has not requested a hearing, the committee should consider the case on the basis of the obtainable information and decide whether he should be removed; otherwise the hearing should go forward. The committee, in consultation with the president and the faculty member, should exercise its judgment as to whether the hearing should be public or private. If any facts are in dispute, the testimony of witnesses and other evidence concerning the matter set forth in the president's letter to the faculty member should be received.

The president should have the option of attendance during the hearing. He may designate an appropriate representative to assist in developing the case; but the committee should determine the order of proof, should normally conduct the questioning of witnesses, and, if necessary, should secure the presentation of evidence important to the case.

The faculty member should have the option of assistance by counsel, whose functions should be similar to those of the representative chosen by the president. The faculty member should have the additional procedural rights set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure,* and should have the aid of the committee, when needed, in securing the attendance of witnesses. The faculty member or his counsel and the representative designated by the president should have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member should have the opportunity to be confronted by all witnesses adverse to him. Where unusual and urgent reasons move the hearing committee to withhold this right, or where the witness cannot appear, the identity of the witness, as well as his

statements, should nevertheless be disclosed to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence should be duly recorded. Unless special circumstances warrant, it should not be necessary to follow formal rules of court procedure.

6. Consideration by Hearing Committee

The committee should reach its decision in conference, on the basis of the hearing. Before doing so, it should give opportunity to the faculty member or his counsel and the representative designated by the president to argue orally before it. If written briefs would be helpful, the committee may request them. The committee may proceed to decision promptly, without having the record of the hearing transcribed, where it feels that a just decision can be reached by this means; or it may await the availability of a transcript of the hearing if its decision would be aided thereby. It should make explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion may be desirable. Publicity concerning the committee's decision may properly be withheld until consideration has been given to the case by the governing body of the institution. The president and the faculty member should be notified of the decision in writing and should be given a copy of the record of the hearing. Any release to the public should be made through the president's office.

7. Consideration by Governing Body

The president should transmit to the governing body the full report of the hearing committee, stating its action. On the assumption that the governing board has accepted the principle of the faculty hearing committee, acceptance of the committee's decision would normally be expected. If the governing body chooses to review the case, its review should be based on the record of the

previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It should frame its decision and communicate it in the same manner as before. Only after study of the committee's reconsideration should the governing body make a final decision overruling the committee.

8. Publicity

Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements about the case by either the faculty member or administrative officers should be avoided so far as possible until the proceedings have been completed. Announcement of the final decision should include a statement of the hearing committee's original action, if this has not previously been made known.

C. 1971 Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments

The Statement which follows was prepared by the Association's Committee A on Academic Freedom and Tenure. It was first published in somewhat different format as a draft report in the March, 1970, AAUP Bulletin, *with comments solicited from members, chapters, and conferences. It was adopted by the Council of the American Association of University Professors in April, 1971, and endorsed by the Fifty-seventh Annual Meeting as Association policy.*

Introduction

The steady growth in the number of institutions new to college and university traditions, and in the number of probationary faculty members, has underscored the need

for adequate procedures in reaching decisions on faculty renewals[1] and for the protection of the probationary faculty member against decisions either in violation of his academic freedom or otherwise improper. Related to this need has been a heightened interest in providing the faculty member with a written statement of reasons for a decision not to offer him reappointment or to grant him tenure. At the Association's Fifty-fifth Annual Meeting, held on April 30 and May 1, 1969, a motion was adopted urging Committee A

> . . . to consider adoption of the position that notice of nonreappointment of probationary faculty be given in writing and that it include the reasons for the termination of the appointment. In any allegation that the reasons are false, or unsupported by the facts, or violative of academic freedom or procedures, the proof should rest with the faculty member.

The position which the Annual Meeting urged Committee A to consider had been the primary topic of discussion at the December 14-15, 1968, meeting of the Committee A Subcommittee on Nontenured Faculty, and it was discussed at length again at the subcommittee's meeting on October 11, 1969, at the regular Committee A meetings of April 27-28 and October 29-30, and at a special meeting of Committee A on January 9-10, 1970. The present statement embodies the consensus arrived at during those meetings.

It has long been the Association's position, as stated in *The Standards for Notice of Nonreappointment,* that "notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should

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[1] These procedures do not apply to special appointments, clearly designated in writing at the outset as involving only a brief association with the institution for a fixed period of time.

be given in writing." Although the Association has not attempted to discourage the giving of reasons, either orally or in writing, for a notice of nonreappointment, it has not required that reasons be given.

In considering this question, Committee A endeavored to appraise the advantages and disadvantages of the Association's present policy and the proposed policy in terms of the Association's traditional concern for the welfare of higher education and its various components, including probationary faculty members. The committee also examined the question of giving reasons in the context of the entire probationary period. As a result, this statement goes beyond the question of giving reasons to the more fundamental subject of general fairness in the procedures related to renewal or nonrenewal of term appointments and the granting of tenure.

STATEMENT

The Probationary Period: Standards and Criteria

The 1940 *Statement of Principles on Academic Freedom and Tenure* prescribes that "during the probationary period a teacher should have the academic freedom that all other members of the faculty have." A number of the nontenured faculty member's rights provide support for his academic freedom. He cannot, for example, be dismissed before the end of a term appointment except for adequate cause which has been demonstrated through academic due process—a right he shares with tenured members of the faculty. If he asserts that he has been given notice of nonreappointment in violation of academic freedom, he is entitled to an opportunity to establish his claim in accordance with Section 10 of Committee A's *Recommended Institutional Regulations*. He is entitled to timely notice of nonreappointment in accordance with

the schedule prescribed in the statement on *The Standards for Notice of Nonreappointment.*[2]

Lacking the reinforcement of tenure, however, the academic freedom of the probationary faculty member has depended primarily upon the understanding and support of his faculty colleagues, the administration, and professional organizations, especially the Association. In the 1966 *Statement on Government of Colleges and Universities,* the Association and other sponsoring organizations have asserted that "faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal." It is Committee A's view that collegial deliberation of the kind envisioned by the *Statement on Government* will minimize the risk both of a violation of academic freedom and of a decision which is arbitrary or based upon inadequate consideration.

Frequently the young faculty member has had no training or experience in teaching, and his first major research endeavor may still be uncompleted at the time he starts his career as a college teacher. Under these circumstances, it is particularly important that there be a probationary period—a maximum of seven years under the 1940 *Statement of Principles on Academic Freedom and Tenure*—

[2] The *Standards for Notice* are as follows:

(1) *Not later than March 1 of the first academic year of service,* if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) *Not later than December 15 of the second academic year of service,* if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.

before tenure is granted. Such a period gives the individual time to prove himself, and his colleagues time to observe and evaluate him on the basis of his performance in the position rather than on the basis only of his education, training, and recommendations.

Good practice requires that the institution (department, college, or university) define its criteria for reappointment and tenure and its procedures for reaching decisions on these matters. The 1940 *Statement of Principles* prescribes that "the precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated." Committee A also believes that fairness to the faculty member prescribes that he be informed, early in his appointment, of the substantive and procedural standards which will be followed in determining whether or not his appointment will be renewed or tenure will be granted.

We accordingly make the following recommendation:

1. *Criteria and Notice of Standards.* The faculty member should be advised, early in his appointment, of the substantive and procedural standards generally employed in decisions affecting renewal and tenure. Any special standards adopted by his department or school should also be brought to his attention.

The Probationary Period: Evaluation and Decision

The relationship of the senior and junior faculty should be one of colleagueship, even though the nontenured faculty member knows that in time he will be judged by his senior colleagues. Thus the procedures adopted for evaluation and possible notification of nonrenewal should not endanger this relationship where it exists, and should encourage it where it does not. The nontenured faculty member should have available to him the advice and assistance of his senior colleagues; and the ability of senior colleagues to make a sound decision on renewal or tenure

will be enhanced if an opportunity is provided for a regular review of the qualifications of nontenured faculty members. Total separation of the faculty roles in counseling and evaluation may not be possible and may at times be unproductive: for example, an evaluation, whether interim or at the time of final determination of renewal or tenure, can be presented in such a manner as to assist the nontenured faculty member as he strives to improve his performance.

Any recommendation regarding renewal or tenure should be reached by an appropriate faculty group in accordance with procedures approved by the faculty. Because it is important both to the faculty member and the decision-making body that all significant information be considered, he should be notified that a decision is to be made regarding renewal of his appointment or the granting of tenure and should be afforded an opportunity to submit material in writing which he believes to be relevant to that decision.

We accordingly make the following recommendations:

2. (a) *Periodic Review.* There should be provision for periodic review of the faculty member's situation during the probationary service.

2. (b) *Opportunity To Submit Material.* The faculty member should be advised of the time when decisions affecting renewal and tenure are ordinarily made, and he should be given the opportunity to submit material which he believes will be helpful to an adequate consideration of his circumstances.

Observance of the practices and procedures outlined above should minimize the likelihood of reasonable complaint if the nontenured faculty member is given notice of nonreappointment. He will have been informed of the criteria and procedures for renewal and tenure; he will have been counseled by faculty colleagues; he will have been given an opportunity to have all material relevant

to his evaluation considered; and he will have received a timely decision representing the view of faculty colleagues.

Notice of Reasons

With respect to giving reasons for a notice of nonreappointment, practice varies widely from institution to institution, and sometimes within institutions. At some, in accordance with the institution's regulations, the faculty member is provided with a written statement of the reasons. At others, generally at the discretion of the department chairman, he is notified of the reasons, either orally or in writing, if he requests such notification. At still others, no statement of reasons is provided even upon request, although information is frequently provided informally by faculty colleagues.

Resolving the question of whether a faculty member should be given a statement of reasons, at least if he requests it, requires an examination of the needs both of the institution and of the individual faculty member.

A major responsibility of the institution is to recruit and retain the best qualified faculty within its means. In a matter of such fundamental importance, the institution, through the appropriate faculty agencies, must be accorded the widest latitude consistent with academic freedom and the standards of fairness. Committee A recognizes that the requirement of giving reasons may lead, however erroneously, to an expectation that the decision-making body must justify its decision. A notice of nonreappointment may thus become confused with dismissal for cause, and under these circumstances the decision-making body may become reluctant to reach adverse decisions which may culminate in grievance procedures. As a result there is a risk that the important distinction between tenure and probation will be eroded.

To be weighed against these important institutional concerns are the interests of the individual faculty member.

He may be honestly unaware of the reasons for a negative decision, and the decision may be based on a judgment of shortcomings which he could easily remedy if informed of them. A decision not to renew an appointment may be based on erroneous information which the faculty member could readily correct if he were informed of the basis for the decision. Again, the decision may be based on considerations of institutional policy or program development which have nothing to do with the faculty member's competence in his field, and if not informed of the reasons he may mistakenly assume that a judgment of inadequate performance on his part has been made. In the face of a persistent refusal to supply the reasons, a faculty member may be more inclined to attribute improper motivations to the decision-making body or to conclude that its evaluation has been based upon inadequate consideration. If he wishes to request a reconsideration of the decision, or a review by another body, his ignorance of the reasons for the decision will create difficulties both in reaching a decision whether to initiate such a request and in presenting his case for reconsideration or review.

After careful evaluation of these competing concerns, Committee A has concluded that the reasons in support of the faculty member's being informed outweigh the countervailing risks. Committee A emphasizes that in reaching this conclusion it does not consider it appropriate to require that every notice of nonreappointment be accompanied by a written statement of the reasons for nonreappointment. It may not always be to the advantage of the faculty member to be informed of the reasons, particularly in writing. If he is informed of them, he can be placed under an obligation to divulge them to the appointing body of another institution if it inquires why he is leaving his present position. Similarly, a written record is likely to become the basis for continuing responses by his former institution to prospective appointing bodies and may thus jeopardize his chances for obtaining positions over an extended period.

At many institutions, moreover, the procedures of evaluation and decision may make it difficult, if not impossible, to compile a statement of reasons which precisely reflects the basis of the decision. When a number of faculty members participate in the decision, they may oppose a reappointment for a variety of reasons, few or none of which may represent a majority view. To include every reason, no matter how few have held it, in a written statement to the faculty member may misrepresent the general view and damage unnecessarily both the faculty member's morale and his professional future.

In many situations, of course, a decision not to reappoint will not reflect adversely upon the faculty member. An institution may, for example, find it necessary for financial or other reasons to restrict its offerings in a given department. A number of institutions appoint more faculty members than they expect to give tenure; at such institutions a limit has been placed on the number of faculty at each rank, and the acquisition of tenure depends not only upon satisfactory performance but also upon an opening in the ranks above instructor or assistant professor. Nonrenewal in these cases is not likely to be psychologically damaging or to suggest a serious adverse judgment.

In these situations, providing a statement of reasons, either written or oral, should pose no difficulty, and such a statement may in fact assist the faculty member in his search for a new position. In other situations, in spite of his awareness of the considerations cited above, the faculty member may ask to be advised of the reasons which contributed to his nonreappointment, and Committee A believes that he should be given such advice. It believes also that he should have the opportunity to request a reconsideration by the decision-making body.

We accordingly make the following recommendation:

3. *Notice of Reasons.* In the event of a decision not to renew his appointment, the faculty member should be in-

formed of the decision in writing, and, if he so requests, he should be advised of the reasons which contributed to that decision. He should also have the opportunity to request a reconsideration by the decision-making body.

Written Reasons

Having been given orally the reasons which contributed to his nonreappointment, the faculty member, to avoid misunderstanding, may request that they be confirmed in writing. He may wish to petition the appropriate faculty committee, in accordance with Section 10 of Committee A's *Recommended Institutional Regulations*, to consider an allegation that the reasons he was given violate his academic freedom, or that the primary reasons for the notice of nonreappointment were not stated and constitute a violation of his academic freedom. He may wish to petition a committee, in accordance with Section 15 of the *Recommended Institutional Regulations*, to consider a complaint that the decision resulted from inadequate consideration and was therefore unfair to him. He may feel that a written statement of reasons may be useful to him in pursuing his professional career.

If the department chairman or other appropriate institutional officer to whom the request is made feels that confirming the oral statement in writing may be damaging to the faculty member on grounds such as those cited earlier in this statement, Committee A believes that it would be desirable for him to explain the possible adverse consequences of confirming the oral statement in writing. If in spite of this explanation the faculty member continues to request a written statement, Committee A believes that his request should be honored.

We accordingly make the following recommendation:

4. *Written Reasons.* If the faculty member expresses a desire to petition the grievance committee (such as is described in Sections 10 and 15 of Committee A's *Rec-*

ommended Institutional Regulations), or any other appropriate committee, to use its good offices of inquiry, recommendation, and report, or if he makes the request for any other reason satisfactory to himself alone, he should have the reasons given in explanation of the nonrenewal confirmed in writing.

Review Procedures: Allegations of Academic Freedom Violations

The best safeguard against a proliferation of grievance petitions on a given campus is the observance of sound principles and procedures of academic freedom and tenure and of institutional government. Committee A believes that observance of the procedures recommended in this statement—procedures which would provide guidance to nontenured faculty members, help assure them of a fair professional evaluation, and enlighten them concerning the reasons contributing to key decisions of their colleagues—would constitute a further step in the achievement of harmonious faculty relationships and the development of well-qualified faculties.

Even with the best practices and procedures, however, faculty members will at times feel that they have been improperly or unjustly treated and may wish another faculty group to review a decision of the faculty body immediately involved. Committee A believes that fairness both to the individual and the institution requires that the institution provide for such a review when it is requested. A possible violation of academic freedom is of vital concern to the institution as a whole, and where a violation is alleged it is of cardinal importance to the faculty and the administration to determine whether substantial grounds for the allegation exist. The institution should also be concerned to see that decisions respecting reappointment are based upon adequate consideration, and provision should thus be made for a review of allegations by affected faculty members that the consideration has been inadequate.

Because of the broader significance of a violation of academic freedom, Committee A believes that the procedures to be followed in these two kinds of complaints should be kept separate. Section 10 of the *Recommended Institutional Regulations,* mentioned earlier in this statement, provides a specific procedure for the review of complaints that academic freedom has been violated.[3]

> If a faculty member on probationary or other nontenured appointment alleges that considerations violative of academic freedom significantly contributed to a decision not to reappoint him, his allegation will be given preliminary consideration by the [insert name of committee], which will seek to settle the matter by informal methods. His allegation shall be accompanied by a statement that he agrees to the presentation, for the consideration of the faculty committees, of such reasons and evidence as the institution may allege in support of its decision. If the difficulty is unresolved at this stage, and if the committee so recommends, the matter will be heard in the manner set forth in Regulations 5 and 6, except that the faculty member making the complaint is responsible for stating the grounds upon which he bases his allegations, and the burden of proof shall rest upon him. If he succeeds in establishing a *prima facie* case, it is incumbent upon those who made the decision not to reappoint him to come forward with evidence in support of their decision.

We accordingly make the following recommendation:

5. *Petition for Review Alleging an Academic Freedom Violation* (Section 10, *Recommended Institutional Regu-*

[3] Because the *Recommended Institutional Regulations* remain under review by Committee A, faculties processing complaints under Sections 10 and 15 may wish to secure the further advice of the Association's Washington Office.

lations). Insofar as the petition for review alleges a violation of academic freedom, the functions of the committee which reviews the faculty member's petition should be the following:

(a) To determine whether or not the notice of nonreappointment constitutes on its face a violation of academic freedom.

(b) To seek to settle the matter by informal methods.

(c) If the matter remains unresolved, to decide whether or not the evidence submitted in support of the petition warrants a recommendation that a formal proceeding be conducted in accordance with Sections 5 and 6 of the *Recommended Institutional Regulations*, with the burden of proof resting upon the complaining faculty member.

Review Procedures: Allegations of Inadequate Consideration

Complaints of inadequate consideration are likely to relate to matters of professional judgment, where the department or departmental agency should have primary authority. For this reason, Committee A believes that the basic functions of the review committee should be to determine whether adequate consideration was given to the appropriate faculty body's decision and, if it determines otherwise, to request reconsideration by that body.

It is easier to state what the standard "adequate consideration" does not mean than to specify in detail what it does. It does not mean that the review committee should substitute its own judgment for that of members of the department on the merits of whether the candidate should be reappointed or given tenure. The conscientious judgment of the candidate's departmental colleagues must prevail if the invaluable tradition of departmental auton-

omy in professional judgments is to prevail. The term "adequate consideration" refers essentially to procedural rather than substantive issues: Was the decision conscientiously arrived at? Was all available evidence bearing on the relevant performance of the candidate sought out and considered? Was there adequate deliberation by the department over the import of the evidence in the light of the relevant standards? Were irrelevant and improper standards excluded from consideration? Was the decision a *bona fide* exercise of professional academic judgment? These are the kinds of questions suggested by the standard "adequate consideration."

If in applying this standard the review committee concludes that adequate consideration was not given, its appropriate response should be to recommend to the department that it assess the merits once again, this time remedying the inadequacies of its prior consideration.

An acceptable review procedure, representing one procedural system within which such judgments may be made, is outlined in Section 15 of the *Recommended Institutional Regulations,* as follows:

> If a faculty member feels that he has cause for grievance in any matter other than dismissal proceedings —such matters as salaries, assignment of teaching duties, assignment of space or other facilities, and propriety of conduct—he may petition the elected faculty grievance committee [here name the committee] for redress. The petition shall set forth in detail the nature of the grievance, and shall state against whom the grievance is directed. It shall contain any factual or other data which the petitioner deems pertinent to his case. The committee will have the right to decide whether or not the facts merit a detailed investigation. Submission of a petition will not automatically entail investigation or detailed consideration thereof. The committee may seek to bring about

a settlement of the issue satisfactory to the parties. If in the opinion of the committee such a settlement is not possible or is not appropriate, the committee will report its findings and recommendations to the petitioner and to the appropriate administrative officer and faculty body [here identify], and the petitioner will, at his request, be provided an opportunity to present his case to them.

The grievance committee will consist of three [or some other number] members of the faculty who have tenure and who are elected at large. No department chairman or administrative officer shall serve on the committee.

We accordingly make the following recommendation:

6. *Petition for Review Alleging Inadequate Consideration* (Section 15, *Recommended Institutional Regulations*). Insofar as the petition for review alleges inadequate consideration, the functions of the committee which reviews the faculty member's petition should be the following:

(a) To determine whether the decision of the appropriate faculty body was the result of adequate consideration in terms of the relevant standards of the institution, with the understanding that the review committee should not substitute its judgment on the merits for that of the faculty body.

(b) To request reconsideration by the faculty body when the committee believes that adequate consideration was not given to the faculty member's qualifications. (In such instances, the committee should indicate the respects in which it believes the consideration may have been inadequate.)

(c) To provide copies of its report and recommendation to the faculty member, the faculty body, and the president or other appropriate administrative officer.